80-1404

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ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
1980 Term

No. _____

ALBERT T. EHLERS

v.

DEVON BOGUE, ET AL.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FIFTH CIRCUIT
ATLANTA, GEORGIA

APPENDICES

Albert T. Ehlers, Pro Se
3142 Argonne Drive, N.W.
Atlanta, Georgia 30305

February 15, 1981.

APPENDIX A

Opinion of District Court

Clerk's Office
Clerk
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ALBERT T. EHLERS	)	
	)	CIVIL ACTION
vs.	)	
	)	
DEVON BOGUE, R.H. HITCHCOCK, BRUCE T. WOOD, THOMAS E. BENNETT and TOM WOOLSEY	)	NO. C79-1974A

O R D E R

This civil rights action is now before the court on defendants' motion for summary judgment. The uncontroverted facts of the case show the following.

Plaintiff, who is acting as counsel pro se, owns an apartment building in southeast Atlanta. The building is managed by Gifford Realty Company, at least to the extent that it is the agent for rent collection, and a sign is posted on the exterior of the building indicating this. Plaintiff does not reside in this building.

Defendants Bogue, Hitchcock, Wood and Bennett are all employees of the Fulton County Health Department; defendant Woolsey is an administrative aide to the Fulton County Board of Commissioners.

On September 5, 1979, defendant Hitchcock was conducting an inspection of Block Number 50 in southeast Atlanta for the purpose of detecting violations of Fulton County Health Department Regulation Number 16, which deals with rat-borne disease control. He conducted a visual inspection of the exterior of plaintiff's apartment building and of a refuse "dumpster" located on the premises. At no time did defendant Hitchcock enter the building, nor did he seek or receive consent from the plaintiff or managing agent to conduct such inspection.

Following his inspection of the building, defendant Hitchcock prepared a report showing three alleged violations of the rodent control regulations: the drain plug in the refuse dumpster was alleged to be missing, permitting rodents to have access to the contents; openings from the outside of the buildings to its interior were alleged to exist, through which rodents might gain access; and rat burrows were alleged to exist in the walkways and around the dumpster, which evidenced the existence of rats on the premises. On September 6, 1979, a copy of this report was mailed to Gifford Realty Company, which received it on or about September 11. The report stated that the alleged violations were to be remedied within seven days or the owner would be subject to prosecution. The notice was forwarded by the realty company to plaintiff, who received it on September 17, according to his complaint. Upon receipt of the report, and on the same day, plaintiff telephoned defendant Hitchcock to complain of the failure of the Health Department to obtain his consent to inspect the premises. Later that day, a reinspection of plaintiff's premises was conducted by defendants Wood and Bennett as a followup to an earlier reinspection that had taken place on September 13. It is unclear from defendants' affidavits whether the reinspections involved any greater intrusion upon plaintiff's property than the original inspection. They found that the conditions noted in the report prepared by defendant Hitchcock remained uncorrected. Defendant Bennett then prepared a summons for plaintiff to appear in the Criminal Court of Fulton County on September 19, 1979 to answer charges of violating the rodent control ordinance. Defendants Wood and Bennett drove to plaintiff's home in northwest Atlanta and sought to speak with plaintiff, after ascertaining his identity and identifying themselves and their purpose in calling on plaintiff. According to defendant Bennett's uncontroverted affidavit, plaintiff refused to open his door and insisted that they converse through the closed door and adjacent window. Bennett's affidavit

further states that defendant Wood inquired of plaintiff whether he needed more time to correct the alleged improper conditions at his property, whereupon plaintiff stated that he did not intend to correct them and for the defendants "to do what [they] had to do." Defendant Bennett then proffered the summons to plaintiff and advised him of its contents. When plaintiff refused to open the door to accept the summons, defendant Wood inserted it into a crack in the front door of plaintiff's residence and both Bennett and Wood left. The above facts are uncontroverted and are obtained from the complaint and the affidavits of defendants Hitchcock, Bennett and Wood. Plaintiff has filed a memorandum but no affidavit in opposition to this motion.

Plaintiff seeks damages based upon 42 U.S.C. § 1983, alleging that the actions of the defendants have violated his fourth and fourteenth amendment rights.

It should initially be noted that, while plaintiff has signed his pleadings in this action as counsel pro se, he is an attorney at law and was admitted to practice before this court in 1949. The pleadings filed by him in this action need not be given the same liberal construction as pro se civil rights pleadings prepared by a nonlawyer.

In order to make out a claim for relief under 42 U.S.C. § 1983, plaintiff must show that defendants were acting under color of state law and committed acts that deprived plaintiff of a right, privilege or immunity secured by the federal Constitution and laws.

At the outset, the court is unsure in what way plaintiff claims that defendant Woolsey violated plaintiff's civil rights. No allegations of wrongdoing by this defendant appear in the complaint. The sole connection of Mr. Woolsey to this case that appears in the record is two letters signed by him and addressed to plaintiff. These letters, dated October 9, 1979 and October

17, 1979, were filed with the complaint in this action, apparently as exhibits. The letters merely state the County's position with regard to plaintiff's claims of constitutional violation and were written by defendant Woolsey in his capacity as executive aide to the Fulton County Commission. These letters fail to support plaintiff's claim of constitutional violation by this defendant and, absent any other showing of a connection to this case, the motion for summary judgment is GRANTED as to defendant Woolsey.

It is clear that the remaining defendants in this case were acting under color of state law. The only issue then is whether their conduct deprived plaintiff of a right secured to him by the Constitution or laws of the United States.

Defendants rely upon Fulton County Health Department Regulations, Number 1, Section 2(1953), to justify their actions in inspecting plaintiff's building. That section states:

> Section 2. INSPECTIONS AND INVESTIGATIONS
>
> The health officer shall have the right to enter on any premises and to make such inspections and investigations as he shall deem necessary to enforce the regulations of the board of health and to protect the public health.
>
> No person shall refuse to allow the health officer to fully inspect any and all premises and no person shall molest or resist the health officer in the discharge of his duties.
>
> The health officer may take and examine reasonable samples of any substance suspected of creating a nuisance or menace to the public health.
>
> The health officer shall promptly investigate every bona fide complaint coming under his jurisdiction, but he may at his discretion refuse to investigate any anonymous complaint.

In the court's judgment, this ordinance is unconstitutional on its face and provides no justification for the defendants' actions in inspecting plaintiff's premises. Its unrefined attempt to convey absolute authority to search upon health officers, in their sole discretion, violates the fourth and fourteenth amendments to the United States Constitution.

The fourth amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This protection has been extended to administrative inspections by municipalities. Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967). This application is particularly apt in this case since violation of the rodent control ordinance carries possible penal sanctions; however, this protection extends to intrusions during civil investigations as well. Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). By the fourteenth amendment this protection is extended to state as well as federal action. Ker v. California, 374 U.S. 23 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960). A search of private property without a search warrant, issued by an independent judicial officer upon probable cause, is generally unreasonable per se. Stoner v. California, 376 U.S. 483 (1964).

It is clear that fourth amendment protection against warrantless administrative inspection extends to business premises. See v. City of Seattle, supra; Marshall v. Barlow's, Inc., supra.

While the ordinance provides no justification for defendants' search, it is equally well-established, however, that the fourth amendment has no application to "sights seen 'in the open fields.'" Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861 (1974), quoting Hester v. United States, 265 U.S. 57, 59 (1924). Thus, even though the defendants who inspected plaintiff's premises may have been upon his property, there is no showing that they strayed into any area from which the general public was excluded. "What is observable by the public is observable, without a warrant, by the Government inspector as well." Marshall v. Barlow's, Inc., supra, at 315. Moreover, even if the defendants trespassed on plaintiff's property, a trespass does not of itself constitute an illegal search. Monnette v. United States, 299 F.2d 847 (5th Cir.

1962); see Air Pollution Variance Board v. Western Alfalfa Corp., supra. The fourth amendment is primarily a safeguard of the security of citizens against arbitrary invasion of their privacy by public officials. See Camara v. Municipal Court, 387 U.S. 523, 528 (1967); Wolf v. Colorado, 338 U.S. 25, 27 (1967). It affords protection of this personal right against any unreasonable infringement. Katz v. United States, 389 U.S. 347 (1967). Since Katz the applicability of the fourth amendment has been said to depend upon the existence of a "reasonable expectation of privacy." 389 U.S. at 360 (Harlan, J., concurring). This test has done away with property concepts no longer satisfactory for fourth amendment analysis; United States v. Williams, 581 F.2d 451, 453 (5th Cir. 1978); and has substituted the more flexible standard of "reasonable expectation of privacy." In this case the court does not view plaintiff as having such an expectation of privacy over the areas of his property inspected by defendants. No showing has been made that the defendants entered into any area not open to the public. Air Pollution Variance Board v. Western Alfalfa Corp., supra, at 865. Further, no legitimate privacy interest can be seen in the refuse dumpster located outside his building. Cf. United States v. Vahalik, 606 F.2d 99 (5th Cir. 1979).

While concepts of property have been generally discarded in fourth amendment analysis as noted above, a vestige of those ideas remains in the concept of the "curtilage" surrounding a dwelling. Thus it must be determined whether plaintiff's apartment building is a dwelling or a business, within the meaning of fourth amendment protection. Although it is undisputed that plaintiff's building is a residence to his tenants, plaintiff does not reside there. Plaintiff rents apartments in the building to his tenants, and the court views this as being a business of plaintiff for the purpose of this analysis. Having decided that plaintiff's building is a business premises rather than his dwelling, the question arises

whether a curtilage exists surrounding the building that defendants may have entered in conducting their inspection, thereby intruding into an area in which plaintiff retained a "reasonable expectation of privacy." See Fixel v. Wainwright, 492 F.2d 480, 483 (5th Cir. 1974).

The court does not believe that the "curtilage" concept has any application to business premises. Historically, the common law definition of curtilage included the "yard, courtyard or other piece of ground included within the fence surrounding a dwelling house." Marullo v. United States, 328 F.2d 361, 363 (5th Cir. 1964), quoting Webster's Third New International Dictionary (1962) (emphasis added). While modern law has generally eliminated the requirement that the area be fenced in order to be considered curtilage, the court has failed to find any case that holds a curtilage exists surrounding business premises.

The court concludes that the "open fields" exclusion from the fourth amendment applies in this case and that the intrusion by defendants did not rise to the level of a constitutional violation. Defendants are cautioned, however, that this result is dictated by the peculiar facts of this case. Georgia Code Annotated, Chapter 88-3A, enacted in 1975, provides for administrative search warrants under the standards laid down in Camara v. Municipal Court and See v. City of Seattle, supra. The Constitution requires and the law provides for obtaining such warrants, absent consent or bona fide emergency, prior to conducting these health inspections. Defendants are admonished to heed this mandate.

In accordance with the foregoing, defendants' motion for summary judgment is GRANTED.

So ORDERED, this ____ day of February, 1980.

NEWELL EDENFIELD
United States District Judge

ATTEST: A TRUE COPY
CERTIFIED THIS
February 11, 1981
Ben H. Carter, Clerk

By: Nellie C. Blocker
Deputy Clerk

APPENDIX B

Opinion of Court of Appeals
Fifth Circuit

Albert T. EHLERS, Plaintiff-Appellant,

v.

Devon BOGUE, R. H. Hitchcock, Bruce T. Wood, Thomas E. Bennett and Tom Woolsey, Defendants-Appellees.

No. 80-7205
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Unit B

Oct. 2, 1980.

Landlord brought action for damages under civil rights statute alleging that inspections of apartment building by county health inspector violated his constitutional rights. The United States District Court for the Northern District of Georgia, Newell Edenfield, J., granted summary judgment adverse to landlord, and he appealed. The Court of Appeals held that even if county health inspectors technically trespassed on apartment building property, no Fourth Amendment violation occurred when inspectors made warrantless visual inspection of exterior of apartment building without seeking or receiving consent of owner; such inspection was valid under "open fields" doctrine.

Affirmed.

1. Searches and Seizures ⇐7(1)

Although Fourth Amendment protects persons against unreasonable government searches and seizures, there is no Fourth Amendment protection against observation by public officials of what is observable by the general public. U.S.C.A.Const. Amend. 4.

2. Searches and Seizures ⇐7(10)

Even if county health inspectors technically trespassed on apartment building property, no Fourth Amendment violation occurred when inspectors made warrantless visual inspection of exterior of apartment building without seeking or receiving consent of owner; such inspection was valid under "open fields" doctrine. U.S.C.A.Const. Amend. 4.

Appeal from the United States District Court for the Northern District of Georgia.

Before RONEY, FRANK M. JOHNSON, Jr., and HENDERSON, Circuit Judges.

PER CURIAM:

The question raised by this appeal from summary judgment for the defendants is whether county health inspectors violated plaintiff's constitutional rights under the Fourth and Fourteenth Amendments when they conducted inspections of the outside of plaintiff's apartment building without a warrant or his consent. We affirm the holding of the district court that the inspection was valid under the "open fields" doctrine as applied in *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861, 94 S.Ct. 2114, 40 L.Ed.2d 607 (1974).

The facts are undisputed. While conducting a routine inspection for violations of Fulton County Health Department Regulation No. 16, dealing with rat and rat-borne disease control, a county health inspector made a visual inspection of the exterior of an apartment building which plaintiff owns but in which he does not

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reside and of a refuse dumpster located on the premises. The warrantless inspection was made without seeking or receiving the consent of the plaintiff. At no time did the inspector enter the building. When reinspection in the same manner revealed that the conditions had not been corrected, plaintiff was charged with violations of the ordinance.

Plaintiff, an attorney, brings this suit *pro se* for damages under 42 U.S.C.A. § 1983 alleging that the inspections violated his constitutional rights. He contends that under the Fourth Amendment, as applied through the Fourteenth, a county health official may not enter onto private business property without a warrant or the consent of the owner in the absence of exigent circumstances.

[1] The Fourth Amendment protects persons against unreasonable government searches and seizures. There is no Fourth Amendment protection, however, against observation by a public official of what is observable by the general public. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315, 98 S.Ct. 1816, 1822, 56 L.Ed.2d 305 (1978).

This concept, known as the "open fields" doctrine, was applied in a very similar case, *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861, 94 S.Ct. 2114, 40 L.Ed.2d 607 (1974). There the Supreme Court held that no Fourth Amendment violation occurred when a health inspector entered Western Alfalfa's outdoor premises without a warrant and without its knowledge or consent to make visual tests of the smoke being emitted from its chimney. The Supreme Court noted that although the health official was on Western Alfalfa's private property, there was no showing that he was on premises from which the general public was excluded. In such circumstances the invasion of privacy was said to be at most abstract and theoretical.

[2] The present case is governed by *Western Alfalfa*. The health inspectors here did not enter plaintiff's apartment building but only visually inspected its exterior and the immediately surrounding grounds. These areas were easily accessible and visible to the general public and the inspectors did not stray into any area from which the general public was excluded. Even if defendants technically trespassed on plaintiff's property, a trespass does not of itself constitute an illegal search. *Monnette v. United States*, 299 F.2d 847, 850 (5th Cir. 1962). In such a situation, Fourth Amendment protections simply do not apply.

AFFIRMED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

APPENDIX C

Opinion of Court of Appeals
Denying Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 80-7205

U.S. COURT OF APPEALS
FILED
NOV 20 1980
GILBERT F. GANUCHEAU
CLERK

ALBERT T. EHLERS,

Plaintiff-Appellant,

versus

DEVON BOGUE, R. H. HITCHCOCK,
BRUCE T. WOOD, THOMAS E. BENNETT
and TOM WOOLSEY,

Defendants-Appellees.

- - - - -

Appeal from the United States District Court for the
Northern District of Georgia

- - - - -

ON PETITION FOR REHEARING

(November 20, 1980)

Before RONEY, FRANK M. JOHNSON, JR., and HENDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

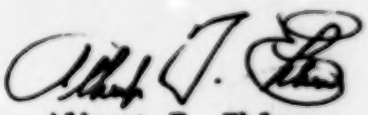
Paul H. Roney
United States Circuit Judge

Form 703-2

CERTIFICATE OF SERVICE

The foregoing Petition for a Writ of Certiorari has been this day, February 14, 1981, served on the attorney representing defendant litigants in this case by depositing copy thereof in the U.S. Mails having proper postage thereon and enclosed in an envelope addressed to:

Guy Parker, Esquire
Associate County Attorney
Suite 1050
Peachtree Center Cain Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303



Albert T. Ehlers
Pro Se